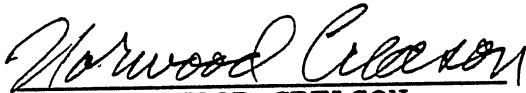
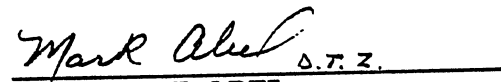


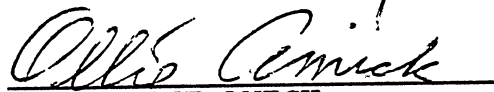
THE MISSOURI HOUSE OF REPRESENTATIVES'
INTERIM COMMITTEE ON THE
NATIONAL FLOOD INSURANCE PROGRAM

Appointed by
SPEAKER BOB F. GRIFFIN


Committee Members


REP. NORWOOD CREASON
CHAIRMAN, District 28


REP. MARK ABEL
District 106


REP. OLLIE AMICK
District 160


REP. BOB HOWARD
District 16


REP. TIM KELLEY
District 6



REP. WES MILLER
District 108

TABLE OF CONTENTS

| | Page |
|---|------|
| Introduction..... | 1 |
| Overview..... | 2 |
| Summary of Testimony..... | 9 |
| Appendices | |
| A: Proposed legislation..... | 14 |
| B: HB 1706..... | 24 |
| C: Table of NFIP counties..... | 31 |
| D: State map of NFIP counties..... | 34 |
| E: Written testimony by DNR..... | 36 |
| F: Attorney General's Opinion NO. 136-90..... | 39 |
| G: Suspension notice from FEMA..... | 50 |

The Missouri House of Representatives'
Interim Committee on the
National Flood Insurance Program

In June 1990, the Honorable Bob F. Griffin, Speaker of the House of Representatives, appointed members to a House Interim Committee to investigate Missouri's alleged non-compliance status with regard to the National Flood Insurance Program. Members of the committee were: Representatives Norwood Creason, Chairman, (D-28), Mark Abel, (D-106), Ollie Amick, (D-160), Bob Howard, (D-16), Tim Kelley (R-6), and Wes Miller (R-108).

The objective of the committee was to investigate Missouri's statutory relationship to the National Flood Insurance Program, and to recommend a solution to the non-compliance status problem as suggested by the Federal Emergency Management Agency. A similar charge was also given to a Senate committee by President pro tem James L. Mathewson.

The committee met 5 times during the interim. On July 16, the committee held a joint meeting in Jefferson City, MO. with the Senate committee. On September 4, the House committee met at Big Lake State Park near Mound City, MO. The Committee also met in Jefferson City on September 13th, October 19th, and November 8th. In addition, the Senate committee met July 11 in Hannibal, MO. and July 12 in Portageville, MO.

overview

In June, 1989, the Missouri Supreme Court ruled that counties could not regulate development in special flood hazard areas on land used for agricultural purposes (St. Charles, County, Missouri, vs. Dardenne Realty Company et al., 771 S.W. 2d 828). Due to this court decision, the Federal Emergency Management Agency (FEMA) has deduced that Missouri counties lack the necessary authority needed to regulate development within floodplains as is required by federal law in order to maintain eligibility for the National Flood Insurance Program (NFIP). Furthermore, Title 42 USC 4012(c) and 4022 prohibits the issuance of flood insurance unless "...adequate land use controls and measures (with effective enforcement provisions)..." have been adopted, and such measures and controls meet minimum NFIP standards. Loss of eligibility and subsequent loss of insurance would affect approximately 60 counties (Appendix C & D). Approximately 5,000 flood insurance policies exist in those 60 counties representing an estimated \$200 million in coverage.

Specifically, a trial court found "that the levees... are farm structures and no permits were or are required." Furthermore, the Missouri Supreme Court affirmed that the statutory language in 64.620, RSMo. pertaining to second and third class counties specifically exempts from

regulation any land used for the raising of crops. As a result, it appears that counties enacting flood plain management ordinances are not able to fully regulate development in flood plains as required by FEMA. According to FEMA, "exemption of any land use within a special flood hazard area from the minimum NFIP requirements is inconsistent with the legislation establishing the NFIP."

County planning and zoning authority and associated "agricultural exemptions" are located in chapter 64.

64.090.2, RSMo (1986): Regarding first class charter counties.

The provisions of 64.010 to 64.160 shall not be exercised or regulations imposed relating to the raising of crops on land used or to be used for agricultural purposes, orchards or forestry, or to require permits with respect to the erection, maintenance, repair, alteration or extension of farm buildings or farm structures to be used as such.

64.620, RSMo (1986): Regarding second and third class counties.

The provisions of 64.510 to 64.690 shall not be exercised so as to impose regulations or to require permits with respect to land, used or to be used for the raising of crops, orchards or forestry or with respect to the erection, maintenance, repair, alteration or extension of farm buildings or farm structures.

64.890.2, RSMo (1986): Regarding fourth class counties and some first, second and third class counties.

The provisions of 64.800 to 64.905 shall not be exercised so as to impose regulations or to require permits with respect to land used or to be used for the raising of crops, pasture, orchards or forestry or with respect to the erection, maintenance, repair, alteration or extension of farm buildings or farm structures.

Using the logic offered by FEMA and the courts, all three sections cited above are inadequate due to the exemption of "farm structures" from the county regulatory authority. Moreover, the language in 64.620. and 64.890.2 is a broad exemption because it applies "to land, used or to be used for agricultural purposes...". The exemption in 64.090.2 is narrower because it applies to regulations relating "to the raising of crops on land used or to be used..." or permits for "...farm structures...".

Authority to implement the NFIP and require compliance with NFIP standards is found in 49.600, RSMo (1986). Through the statutory language of this section, counties without planning and zoning, may adopt regulations requiring compliance with FEMA standards. Included in 49.600.3 are two specific exemptions: 1) "...land used or to be used for the raising of livestock, crops, orchards or forestry,...."; and 2) "the erection, maintenance, repair, alteration or extension of farm buildings or farm structures...which will not increase flood heights." While the exemption in 49.600 is similar to those exemptions present in the planning and zoning sections, the modifier "...which will not increase flood heights" does differentiate the intent of this exemption from all others. However, FEMA contends that the regulation of structures affecting flood heights is not enough, and that regulation must also address elevation of structures above base flood

elevations. Therefore, the statutory language in 49.600 also falls short of FEMA's expectations regarding NFIP standards.

In addition to the concerns stated above, a Missouri Attorney General's opinion (Number 117-89) concluded that levees controlled by levee districts also are not subject to regulation by community floodplain management ordinances. Therefore, any political subdivision which contains a levee district would also be non-compliant and subsequently ineligible for future NFIP participation.

In February, Mr. Frank Thomas, Assistant Administrator of the Office of Loss Reduction, FEMA sent a letter to Governor Ashcroft regarding the non-compliance issue. In that letter, as well as in testimony presented before a Missouri House committee, FEMA identified three legislative elements that must be addressed in order to bring counties into compliance:

- 1) Floodplain management regulations adopted by Missouri counties must be made applicable to all development in the communities' designated flood hazard areas;

- 2) Floodplain management regulations must be applied to all classes of counties; and

- 3) Levees or other floodplain developments controlled by levee or drainage districts must also be subject to floodplain regulations.

The Governor's office responded to FEMA in late February and advised FEMA of the existence of House Bill 1706 (Appendix B), introduced by Representative Norwood Creason as a means of correcting the statutory conflict. In addition, the Governor's office indicated to FEMA that amendments would be offered to HB 1706 that would "afford Missouri counties zoning authority over levee and drainage districts." After considerable debate, HB 1706 was perfected by the House on April 24, 1990. However, due to time constraints, HB 1706 could not be addressed by the Senate and the measure died on the calendar.

On June 1, 1990, Mr. Harold T. Duryee, Administrator of the Federal Insurance Administration, FEMA notified Governor Ashcroft that suspension of counties from the NFIP would be forthcoming, and that the issuance of new flood insurance policies or the renewal of existing policies would cease in those affected counties. However, action against the state was deferred until July 6, 1990 in order to provide time for the development of an alternative interpretation by the Missouri Attorney General of the Missouri Supreme Court ruling.

Also on June 1, Governor Ashcroft wrote President Bush regarding FEMA's position on this issue. The Governor indicated that the Missouri General Assembly made a "good faith" effort to correct the situation but passage of legislation was difficult due to "the lateness of FEMA's

notification." Moreover, the Governor advised the President Bush of the House interim committee and suggested that a one year deferment of any action against the state would give the General Assembly enough time to "consider corrective legislation".

Also, on June 14, 1990, the Missouri Congressional Delegation signed a letter prepared by U.S. Senator Christopher "Kit" Bond requesting that FEMA defer any action against the state and give time to let the "legislative process work."

On June 18, 1990, an Attorney General's Opinion was requested by the Governor's office. Accompanying the request was a suggested opinion, presumably prepared by the Department of Natural Resources. On July 2, 1990 the Attorney General's Office responded with Opinion Letter No. 136-90 (Appendix F).

In summary, the Attorney General's opinion states that:

1) Second, and third class counties may not regulate agricultural lands or farm buildings and structures used for agricultural purposes;

2) First class charter counties may regulate agricultural lands but may not require permits for farm buildings and structures;

3) First class noncharter counties may fully regulate agricultural lands, farm buildings and farm structures; and

4) Counties without county planning and zoning may enact ordinances to meet FEMA standards pursuant to 49.600, and that such ordinances may regulate agricultural lands, farm buildings and structures, and underground mining shafts in areas subject to flooding.

Therefore, the Attorney General's office believes that counties deriving their regulatory authority from 49.600 - 49.615, RSMo (1986), first class noncharter counties, and, to some degree, first class charter counties, all have authority to enforce the requirements of the NFIP. Conversely, second and third class counties deriving their authority from chapter 64, lack the necessary regulatory authority required by FEMA.

On August 22, 1990, Governor Ashcroft received noticed from C.M. "Bud" Schauerte, Administrator, Federal Insurance Administration, FEMA. In his letter, Mr. Schauerte indicated that the Missouri Attorney General's opinion (136-90) confirmed FEMA's position regarding the noncompliance issue, and that FEMA would initiate suspension of the 60 Missouri counties. However, FEMA did agree to defer suspension for six months beginning September 1, 1990, and that a formal notice of suspension would sent to the counties "on or about February 1, 1991, with a suspension effective date of March 4, 1991."

Summary of Testimony

Public Hearing Number 1, July 16, 1990

Jefferson City, MO.

On July 16, 1990, the House and Senate Interim Committees met in Jefferson City to hear testimony and to assess the problem of Missouri's noncompliance with FEMA's NFIP eligibility requirements.

1. Mr. Richard Stickann, Senate Research Staff.

Mr. Stickann discussed the Senate interim committee hearings in Hannibal and Portageville, MO.

2. Mr. Frank Begeley, FEMA, Region VII, Kansas City.

Mr. Begeley discussed FEMA's position and detailed the series of events that led to the interpretation of non-compliance. Considerable discussion focused on whether FEMA has authority to suspend eligibility of all 60 counties or only those counties that regulate under those sections of law that were addressed by pertinent court cases. Mr. Begeley indicated that FEMA had received AG Opinion 136-90 and that the legal department was still reviewing the opinion; therefore, any action against the state would be on hold until the review was complete.

3. Mr. Steve Jeffery and Mr. Jim Williams, Department of Natural Resources. (See written testimony, Appendix E).

Mr. Jeffery discussed the DNR's role in this matter. DNR disagrees with the interpretation of the law in light of the court decision. Also, DNR believes that the state should be given a probationary period to correct the statutory language, especially since the state has not done anything to diminish the state's authority in regulating for the purposes of NFIP eligibility.

4. Rep. Steve Ehlmann, District 119.

Rep. Ehlmann discussed his concerns with FEMA's edict. The language referencing compliance by "political subdivisions" in the defeated HB 1706 amendment is a problem due to the number of entities encompassed. Also, the court decision addressed 2nd and 3rd class planning and zoning; therefore, other counties should not be affected except for the levee issue.

5. Mr. Herman Skaggs, Marble Hill, MO.

Mr. Skaggs suggested that authority be given to counties to adopt FEMA regulations. Counties could give permits for structures as needed and grant variances case by case. Also, passing authority to counties may cause a "Hancock problem."

6. Mr. Raymond Wagner, Counsel, Governor's Office.

Mr. Wagner indicated that the Governor's office had been in contact with FEMA regularly and that they were awaiting response from Mr. Harold Duryee regarding the the AG's opinion.

7. Mr. Steven Lauer, Planning Director, St Charles Co.

Mr. Lauer expressed concern regarding additional regulation in the floodplain and the impact such regulation will have upon the ability of St. Charles Co. to handle future growth and development.

8. Mr. Rodney Garvett, Presiding Commissioner, Callaway Co.

Mr. Garvett was concerned about loss of eligibility if FEMA suspends counties. Also, if counties are going to regulate, funding should be provided to the counties.

Public Hearing Number 2, September 4, 1990

Big Lake State Park, Mound City, MO.

1. Mr. John LaRandeau and Mr. Larry Buss, U.S. Army Corp of Engineers, Missouri River Project Office.

Mr. LaRandeau and Mr. Buss explained the Corp's role in this matter and answered questions from the committee. The Corp's role is minimal with regard to flood insurance. Their involvement is primarily technical with regard to placement and construction of levees, and section 404 permits. The primary concern of the Corp is the effect of levees on flood heights or flood heights on neighbors.

2. Mr. Don Gilmore, Village of Big Lake, MO.

Mr. Gilmore disapproves of the agricultural exemption.

All buildings should be built according to FEMA standards. Farmers are given too many breaks.

3. Mr. Darrel R. Clausen, Hamburg, IA.

Mr. Clausen detailed a personal experience regarding the construction of a levee by his neighbor and the subsequent flooding and damage to his land. Lack of regulations for levees allow individuals to construct levees without regard for potential damage to adjacent property owners.

4. Mr. James E. Jarrett, Andrew Co. Commissioner.

Mr. Jarrett expressed concern about the potential loss of federal dollars should the counties be suspended.

Public Hearing Numbers 3, 4 & 5

September 13, October 19, and November 8, 1990

Jefferson City, MO.

The Interim Committee met three times in Jefferson City in order to discuss and prepare legislation. In addition, Rep. Creason met with FEMA representatives in Kansas City on October 1, 1990 to discuss the specific legislative requirements FEMA has requested.

On October 19th, two draft bills were presented to the committee for their review. One was prepared by the legislative staff and the other was offered by the DNR's General Counsel. On November 8th, a final bill was

presented to the Committee by Rep. Creason (Appendix A). Copies of the final proposed legislation were sent to FEMA for their review, and were given to the staff from DNR and the Governor's Office.

The proposed legislation makes changes to sections 49.600, 64.090, 64.620, and 64.890, RSMo. Generally, the agricultural exemption language has been rewritten to be consistent in all sections. The raising of crops, livestock, orchards, forestry, and seasonal agricultural impoundments would exempt from regulation. Activities dealing with construction or alteration of farm structures would be regulated unless such activity is not within a defined flood hazard area. Moreover, levee districts would be subject to floodplain management regulations adopted by a county.

APPENDIX A

Legislation Proposed by the Interim Committee

AN ACT

To repeal sections 49.600, 64.620 and 64.890, RSMo 1986, and section 64.090, RSMo Supp. 1990, and to enact in lieu thereof five new sections for the purpose of providing for flood hazard mitigation.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI,
AS FOLLOWS:

Section A. Sections 49.600, 64.620, and 64.890, RSMo 1986, and section 64.090, RSMo Supp. 1990, are repealed and five new sections enacted in lieu thereof, to be known as sections 49.600, 64.001, 64.090, 64.620, and 64.890, to read as follows:

49.600. 1. The county commission, in all counties [which border the Mississippi River or the Missouri River and] which have not adopted county planning and zoning, may, as provided by law, adopt or rescind by order or ordinance regulations to require compliance with Federal Emergency Management Agency standards, necessary to comply with the national flood insurance program, in any flood hazard area designated by the Federal Emergency Management Agency[, and the county commission in any other county which has not adopted county planning and zoning, may, as provided by law, adopt or rescind by order or ordinance regulations to require compliance with Federal Emergency Management Agency standards necessary to comply with the national flood insurance program in any flood hazard area designated by the Federal Emergency Management Agency]; provided, however, that no ordinance or order enacted pursuant to this section in any

county [other than those counties which border the Mississippi River or the Missouri River] shall be effective unless the county commission or governing body of the county submits to the voters of a county, at a county or state general, primary or special election, a proposal to authorize the county commission or governing body of the county to adopt such an order or ordinance.

2. The ballot of submission shall contain but need not be limited to the following language:

Shall the county of enact an order or ordinance for such regulations as required for compliance with Federal Emergency Management standards, necessary to comply with the national flood insurance program, in any flood hazard area designated by the Federal Emergency Management Agency?

☐ Yes

☐ No

If you are in favor of the question, place an "X" in the box opposite "yes". If you are opposed to the question, place an "X" in the box opposite "No".

If a majority of the votes cast on the proposal by the qualified voters voting thereon are in favor of the proposal, then the ordinance or order and any amendments thereto shall be in effect.

If a majority of the votes cast by the qualified voters voting are opposed to the proposal, then the governing body of the county shall have no power to adopt such an order or ordinance.

The people of a county covered by sections 49.600 to 49.615 may rescind the order or ordinance regulations by presenting an initiative petition to the county commission of [said] the

county, with a minimum of five percent of the registered voters' signatures that voted in the last gubernatorial election. After receiving the qualifying initiative petition the county commission shall place on the ballot at the next general election the following:

Shall national flood insurance programs be adopted in
..... County?

[] Yes

[] No

If a majority of those voting vote for adopting the national flood insurance program, the program shall be continued; if a majority of those voting vote against adopting the national flood insurance program, the program shall be discontinued within thirty days after certification of the election results.

3. The provisions of this section shall not apply to the incorporated portions of the counties, or to [land used or to be used for] the raising of livestock, crops, orchards or forestry, nor to seasonal or temporary impoundments used for rice farming or related activities. Nor shall this section apply to the erection, maintenance, repair, alteration or extension of farm buildings or farm structures used for such purposes [on these lands and shall not] in an area not within the area shown on the flood hazard area map. Nor shall this section apply to underground mining where entrance is through an exiting shaft or shafts or through a shaft or shafts in an area not within the area shown on the flood hazard [boundary] area map[, which will not increase flood heights].

4. Levee districts organized pursuant to chapter 245, RSMo, and drainage districts organized pursuant to chapters 242 and 243, RSMo, are subject to flood plain management regulations adopted by a county pursuant to this chapter.

[4.] 5. Nothing contained [herein] in sections 49.600 to 49.615 shall affect the existence or validity of an ordinance which a county has adopted prior to March [15, 1983.] 4, 1991.

64.001. Any levee district organized pursuant to chapter 245, RSMo, and any drainage district organized pursuant to chapters 242 and 243, RSMo, are subject to any flood plain management regulations adopted by any county pursuant to this chapter.

64.090. 1. For the purpose of promoting health, safety, morals, comfort or the general welfare of the unincorporated portion of counties, to conserve and protect property and building values, to secure the most economical use of the land and to facilitate the adequate provision of public improvements all in accordance with a comprehensive plan, the county commission in all counties of the first class, as provided by law, except in counties of the first class not having a charter form of government, is hereby empowered to regulate and restrict, by order, in the unincorporated portions of the county, the height, number of stories and size of buildings, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence or other purposes, including areas for agriculture, forestry and

recreation.

2. The provisions of [sections 64.010 to 64.160] this section shall not [be exercised or regulations imposed relating] apply to the incorporated portions of the counties, nor to the raising of crops [on land used or to be used for agricultural purposes], livestock, orchards, or forestry, [or to require permits with respect to] nor to seasonal or temporary impoundments used for rice farming or related activities. This section shall not apply to the erection, maintenance, repair, alteration or extension of farm [buildings or farm] structures [to be] used [as] for such[.] purposes in an area not within the area shown on the flood hazard area map. This section shall not apply to underground mining where entrance is through an existing shaft or shafts or through a shaft or shafts not within the area shown on the flood hazard area map.

3. The powers by sections 64.010 to 64.160 given shall not be exercised so as to deprive the owner, lessee or tenant of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted except that reasonable regulations may be adopted for the gradual elimination of nonconforming uses, nor shall anything [herein] in sections 64.010 to 64.160 interfere with such public utility services as may have been or may hereafter be specifically authorized or permitted by a certificate of public convenience and necessity, or order issued by the public service commission, or by permit of the county commission.

4. For the purpose of any zoning regulation adopted under

the provisions of sections 64.010 to 64.160, the classification of single family dwelling or single family residence shall include any home in which eight or fewer unrelated mentally or physically handicapped persons reside, and may include two additional persons acting as houseparents or guardians who need not be related to each other or to any of the mentally or physically handicapped persons. The classification of single family dwelling or single family residence shall also include any private residence licensed by the division of family services or department of mental health to provide foster care to one or more but less than seven children who are unrelated to either foster parent by blood, marriage or adoption. A zoning regulation may require that the exterior appearance of the home and property be in reasonable conformance with the general neighborhood standards and may also establish reasonable standards regarding the density of such individual homes in any specific single family dwelling or single family residence area. Should a single family dwelling or single family residence as defined in this subsection cease to operate for the purposes specified in this subsection, any other use of such dwelling or residence, other than that allowed by the zoning regulations, shall be approved by the county board of zoning adjustment. Nothing in this subsection shall be construed to relieve the division of family services, the department of mental health or any other person, firm or corporation occupying or utilizing any single family dwelling or single family residence for the purposes specified in this subsection from compliance with any ordinance or regulation relating to occupancy

permits except as to number and relationship of occupants or from compliance with any building or safety code applicable to actual use of such single family dwelling or single family residence.

5. Nothing contained in sections 64.010 to 64.160 shall affect the existence or validity of an ordinance which a county has adopted prior to March 4, 1991.

64.620. 1. For the purpose of promoting health, safety, morals, comfort or the general welfare of the unincorporated portion of counties of the second or third class to conserve and protect property and building values, to secure the most economical use of the land, and to facilitate the adequate provision of public improvements all in accordance with a comprehensive plan, the county commission of any county to which sections 64.510 to 64.690 are applicable as provided in section 64.510 shall have power after approval by vote of the people as provided in section 64.530 to regulate and restrict, by order of record, in [said] the unincorporated portions of the county, the height, number of stories, and size of buildings, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence or other purposes, including areas for agriculture, forestry, and recreation.

2. The provisions of [sections 64.510 to 64.690] this section shall not [be exercised so as to impose regulations or to require permits with respect to land, used or to be used for] apply to the incorporated portions of the counties, or to the

raising of crops, livestock, orchards, or forestry [or with respect], or to seasonal or temporary impoundments used for rice farming or related activities. This section shall not apply to the erection, maintenance, repair, alteration or extension of farm buildings or farm structures[.] used for such purposes in an area not within the area shown on the flood hazard area map. This section shall not apply to underground mining where entrance is through an existing shaft or shafts or through a shaft or shafts not within the area shown on the flood hazard area map.

3. The powers granted by sections 64.510 to 64.690 shall not be construed:

(1) So as to deprive the owner, lessee or tenant of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted;

(2) So as to deprive any court of the power of determining the reasonableness of regulations and powers in any action brought in any court affecting the provisions of sections 64.510 to 64.690, or the rules and regulations adopted thereunder;

(3) To authorize interference with such public utility services as may have been or may hereafter be authorized or ordered by the public service commission or by permit of the county commission, as the case may be.

4. Nothing contained in sections 64.510 to 64.695 shall affect the existence or validity of an ordinance which a county has adopted prior to March 4, 1991.

64.890. 1. Nothing in sections 64.800 to 64.905 shall affect the recovery of natural resources by strip or open-cut

mining; provided, that commercial structures shall be permitted in all districts except those zoned for residential or recreational use.

2. The provisions of [sections 64.800 to 64.905] this section shall not [be exercised so as to impose regulations or to require permits with respect to land used or to be used for] apply to the incorporated portions of the counties, nor to the raising of crops, [pasture,] livestock, crops, orchards or forestry [or with respect] nor to seasonal or temporary impoundments used for rice farming or related activities. This section shall not apply to the erection, maintenance, repair, alteration or extension of farm buildings or farm structures[.] used for such purposes in an area not within the area shown on the flood hazard area map. This section shall not apply to underground mining where entrance is through an existing shaft or shafts or through a shaft or shafts not within the area shown on the flood hazard area map.

3. Nothing contained in sections 64.800 to 64.905 shall affect the existence or validity of an ordinance which a county has adopted prior to March 4, 1991.

APPENDIX B

House Bill 1706 from the 85th General Assembly

SECOND REGULAR SESSION

[PERFECTED]

HOUSE BILL NO. 1706
85TH GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVE CREASON.

Read 1st time February 1, 1990 and 1000 copies ordered printed.

Read 2nd time February 5, 1990 and referred to the Committee on State Parks, Recreation & Natural Resources, February 5, 1990.

Reported from the Committee on State Parks, Recreation & Natural Resources, March 20, 1990 with recommendation that the bill Do Pass with House Committee Amendment No. 1.

Taken up for Perfection April 24, 1990.

Bill ordered Perfected and printed, as amended.

DOUGLAS W. BURNETT, Chief Clerk

3376-1

AN ACT

To repeal sections 49.600, 64.620 and 64.890, RSMo 1986, and section 64.090, RSMo Supp. 1989, and to enact in lieu thereof six new sections for the purpose of providing for flood hazard mitigation.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Sections 49.600, 64.620 and 64.890, RSMo 2 1986, and section 64.090, RSMo Supp. 1989, are repealed 3 and six new sections enacted in lieu thereof, to be known 4 as sections 49.600, 64.090, 64.620, 64.625, 64.890 and 5 640.200, to read as follows:

49.600. 1. The county commission, in all counties 2 which border the Mississippi River or the Missouri River 3 and which have not adopted county planning and zoning, 4 may, as provided by law, adopt or rescind by order or 5 ordinance regulations to require compliance with Federal 6 Emergency Management Agency standards, necessary

EXPLANATION—Matter enclosed in bold faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

7 to comply with the national flood insurance program,
 8 in any flood hazard area designated by the Federal
 9 Emergency Management Agency, and the county
 10 commission in any other county which has not adopted
 11 county planning and zoning, may, as provided by law,
 12 adopt or rescind by order or ordinance regulations to
 13 require compliance with Federal Emergency Manage-
 14 ment Agency standards necessary to comply with the
 15 national flood insurance program in any flood hazard
 16 area designated by the Federal Emergency Management
 17 Agency; provided, however, that no ordinance or order
 18 enacted pursuant to this section in any county other than
 19 those counties which border the Mississippi River or the
 20 Missouri River shall be effective unless the governing
 21 body of the county submits to the voters of a county,
 22 at a county or state general, primary or special election,
 23 a proposal to authorize the governing body of the county
 24 to adopt such an order or ordinance.

25 2. The ballot of submission shall contain but need
 26 not be limited to the following language:

27 Shall the county of enact an order
 28 or ordinance for such regulations as required for
 29 compliance with Federal Emergency Management
 30 standards, necessary to comply with the national flood
 31 insurance program, in any flood hazard area designated
 32 by the Federal Emergency Management Agency?

33 ☐ Yes

34 ☐ No

35 If you are in favor of the question, place an "X" in the
 36 box opposite "Yes". If you are opposed to the question,
 37 place an "X" in the box opposite "No".

38 If a majority of the votes cast on the proposal by the
 39 qualified voters voting thereon are in favor of the
 40 proposal, then the ordinance or order and any amend-

41 ments thereto shall be in effect. If a majority of the votes
 42 cast by the qualified voters voting are opposed to the
 43 proposal, then the governing body of the county shall
 44 have no power to adopt such an order or ordinance. The
 45 people of a county covered by sections 49.600 to 49.615
 46 may rescind the order or ordinance regulations by
 47 presenting an initiative petition to the county commis-
 48 sion of said county, with a minimum of five percent of
 49 the registered voters' signatures that voted in the last
 50 gubernatorial election. After receiving the qualifying
 51 initiative petition the county commission shall place on
 52 the ballot at the next general election the following:

53 Shall national flood insurance programs be adopted
 54 in County?

55 ☐ Yes

56 ☐ No

57 If a majority of those voting vote for adopting the
 58 national flood insurance program, the program shall be
 59 continued; if a majority of those voting vote against
 60 adopting the national flood insurance program, the
 61 program shall be discontinued within thirty days after
 62 certification of the election results.

63 3. The provisions of this section shall not apply to
 64 the incorporated portions of the counties, or to [land used
 65 or to be used for] the raising of livestock, crops, orchards
 66 or forestry[, nor]. Nor shall this section apply to the
 67 erection, maintenance, repair, alteration or extension of
 68 farm buildings or farm structures used for such purposes
 69 [on these lands and shall not] in an area not within
 70 the area shown on the flood hazard area map, or
 71 to seasonal or temporary impoundments used for
 72 agricultural purposes. Nor shall this section apply
 73 to underground mining where entrance is through an
 74 existing shaft or shafts or through a shaft or shafts in

75 an area not within the area shown on the flood hazard
76 [boundary] area map[, which will not increase flood
77 heights]. However for the purposes of this section,
78 levees shall not be considered farm structures.

79 4. Notwithstanding the provisions of section
80 64.620 and subsection 2 of section 64.090, any
81 construction, enlargement, or repair of any levee,
82 building, or any other structure located in a flood
83 hazard area identified by a hydrologic and engi-
84 neering study published by a federal or state
85 agency is subject to regulation by the appropriate
86 county governing body.

87 [4.] 5. Nothing contained herein shall affect the
88 existence or validity of an ordinance which a county has
89 adopted prior to March 15, 1983.

64.090. 1. For the purpose of promoting health,
2 safety, morals, comfort or the general welfare of the
3 unincorporated portion of counties, to conserve and
4 protect property and building values, to secure the most
5 economical use of the land and to facilitate the adequate
6 provision of public improvements all in accordance with
7 a comprehensive plan, the county commission in all
8 counties of the first class, as provided by law, except
9 in counties of the first class not having a charter form
10 of government, is hereby empowered to regulate and
11 restrict, by order, in the unincorporated portions of the
12 county, the height, number of stories and size of
13 buildings, the percentage of lots that may be occupied,
14 the size of yards, courts and other open spaces, the density
15 of population, the location and use of buildings, structures
16 and land for trade, industry, residence or other purposes,
17 including areas for agriculture, forestry and recreation.

18 2. The provisions of sections 64.010 to 64.160 shall
19 not be exercised or regulations imposed relating to the

20 raising of crops [on land used or to be used for agricultural
21 purposes], livestock, orchards, or forestry, or to require
22 permits with respect to the erection, maintenance, repair,
23 alteration or extension of farm buildings or farm
24 structures to be used as such. However for the
25 purposes of this section, levees shall not be
26 considered farm structures.

27 3. The powers by sections 64.010 to 64.160 given shall
28 not be exercised so as to deprive the owner, lessee or
29 tenant of any existing property of its use or maintenance
30 for the purpose to which it is then lawfully devoted except
31 that reasonable regulations may be adopted for the
32 gradual elimination of nonconforming uses, nor shall
33 anything herein interfere with such public utility services
34 as may have been or may hereafter be specifically
35 authorized or permitted by a certificate of public
36 convenience and necessity, or order issued by the public
37 service commission, or by permit of the county
38 commission.

39 4. For the purpose of any zoning regulation adopted
40 under the provisions of sections 64.010 to 64.160, the
41 classification of single family dwelling or single family
42 residence shall include any home in which eight or fewer
43 unrelated mentally or physically handicapped persons
44 reside, and may include two additional persons acting
45 as houseparents or guardians who need not be related
46 to each other or to any of the mentally or physically
47 handicapped persons. The classification of single family
48 dwelling or single family residence shall also include any
49 private residence licensed by the division of family
50 services or department of mental health to provide foster
51 care to one or more but less than seven children who
52 are unrelated to either foster parent by blood, marriage
53 or adoption. A zoning regulation may require that the

54 exterior appearance of the home and property be in
 55 reasonable conformance with the general neighborhood
 56 standards and may also establish reasonable standards
 57 regarding the density of such individual homes in any
 58 specific single family dwelling or single family residence
 59 area. Should a single family dwelling or single family
 60 residence as defined in this subsection cease to operate
 61 for the purposes specified in this subsection, any other
 62 use of such dwelling or residence, other than that allowed
 63 by the zoning regulations, shall be approved by the
 64 county board of zoning adjustment. Nothing in this
 65 subsection shall be construed to relieve the division of
 66 family services, the department of mental health or any
 67 other person, firm or corporation occupying or utilizing
 68 any single family dwelling or single family residence for
 69 the purposes specified in this subsection from compliance
 70 with any ordinance or regulation relating to occupancy
 71 permits except as to number and relationship of
 72 occupants or from compliance with any building or safety
 73 code applicable to actual use of such single family
 74 dwelling or single family residence.

64.620. 1. For the purpose of promoting health,
 2 safety, morals, comfort or the general welfare of the
 3 unincorporated portion of counties of the second or third
 4 class to conserve and protect property and building
 5 values, to secure the most economical use of the land,
 6 and to facilitate the adequate provision of public
 7 improvements all in accordance with a comprehensive
 8 plan, the county commission of any county to which
 9 sections 64.510 to 64.690 are applicable as provided in
 10 section 64.510 shall have power after approval by vote
 11 of the people as provided in section 64.530 to regulate
 12 and restrict, by order of record, in said unincorporated
 13 portions of the county, the height, number of stories, and

14 size of buildings, the percentage of lots that may be
 15 occupied, the size of yards, courts and other open spaces,
 16 the density of population, the location and use of
 17 buildings, structures and land for trade, industry,
 18 residence or other purposes, including areas for agricul-
 19 ture, forestry, and recreation.

20 2. The provisions of sections 64.510 to 64.690 shall
 21 not be exercised so as to impose regulations or to require
 22 permits with respect to [land, used or to be used for] the
 23 raising of crops, livestock, orchards, or forestry or with
 24 respect to the erection, maintenance, repair, alteration
 25 or extension of farm buildings or farm structures, or to
 26 seasonal or temporary impoundments used for
 27 agricultural purposes. However for the purposes
 28 of this section, levees shall not be considered farm
 29 structures.

30 3. The provisions of sections 64.510 to 64.690
 31 may be exercised so as to impose regulations and
 32 require permits by the governing body of the
 33 county as is necessary for any purpose the govern-
 34 ing body deems appropriate as is provided in
 35 section 64.530 to include such regulations as are
 36 necessary to regulate the erection, maintenance,
 37 repair, alteration, or extension of farm buildings
 38 or farm structures, and levees, or any other
 39 structures located on lands in flood hazard areas
 40 identified by hydrologic and engineering studies
 41 published by a federal or state agency as necessary
 42 to meet the minimum qualifications for the
 43 national flood insurance program.

44 4. The powers granted by sections 64.510 to 64.690
 45 shall not be construed (1) so as to deprive the owner,
 46 lessee or tenant of any existing property of its use or
 47 maintenance for the purpose to which it is then lawfully

48 devoted; (2) so as to deprive any court of the power of
 49 determining the reasonableness of regulations and
 50 powers in any action brought in any court affecting the
 51 provisions of sections 64.510 to 64.690, or the rules and
 52 regulations adopted thereunder; (3) nor to authorize
 53 interference with such public utility services as may have
 54 been or may hereafter be authorized or ordered by the
 55 public service commission or by permit of the county
 56 commission, as the case may be.

64.625. As used in the laws of this state, unless
 2 the context dictates otherwise, the following terms
 3 mean:

4 (1) "Farm structure", any structure on a farm
 5 which is not open on one or more sides;

6 (2) "Flood hazard area", means the area
 7 inundated by a one percent chance per year flood,
 8 or national flood insurance program base flood,
 9 as determined by maps and studies of the Federal
 10 Insurance Administration of the Federal Emer-
 11 gency Management Agency, or maps and studies
 12 of the state department of natural resources, or
 13 by determining the best available information on
 14 flooding in that area;

15 (3) "Structure", a walled and roofed building,
 16 including a manufactured home.

64.390. 1. Nothing in sections 64.800 to 64.905 shall
 2 affect the recovery of natural resources by strip or open-
 3 cut mining; provided, that commercial structures shall
 4 be permitted in all districts except those zoned for
 5 residential or recreational use.

6 2. The provisions of sections 64.800 to 64.905 shall
 7 not be exercised so as to impose regulations or to require
 8 permits with respect to land used or to be used for the
 9 raising of crops, pasture, orchards or forestry or with

10 respect to the erection, maintenance, repair, alteration
 11 or extension of farm buildings or farm structures.
 12 However, the provisions of sections 64.800 to
 13 64.905 may be exercised so as to impose regula-
 14 tions and require permits by the governing body
 15 of the county as is necessary for any purpose the
 16 governing body deems appropriate to include such
 17 regulations as are necessary to regulate the
 18 erection, maintenance, repair, alteration, or
 19 extension of farm buildings or farm structures, and
 20 levees, or any other structures located on lands in
 21 flood hazard areas identified by hydrologic and
 22 engineering studies published by a federal or state
 23 agency as necessary to meet the minimum qual-
 24 ifications for the national flood insurance pro-
 25 gram. The powers granted by sections 64.800 to 64.845
 26 and 64.850 to 64.880 shall not be construed;

27 (1) So as to deprive the owner, lessee or tenant of
 28 any existing property of its use or maintenance for the
 29 purpose to which it is then lawfully devoted;

30 (2) So as to deprive any court of the power of
 31 determining the reasonableness of regulations and
 32 powers in any action brought in any court affecting the
 33 provisions of sections 64.800 to 64.905 or the rules and
 34 regulations adopted thereunder;

35 (3) Nor to authorize interference with the public
 36 utility services as may have been or may [hereafter] be
 37 authorized or ordered by the public service commission
 38 or by permit of the county commission, as the case may
 39 be.

640.200. The department of natural resources
 2 shall establish an office to deal with flood hazard
 3 mitigation and the national flood insurance plan.
 4 The office shall be charged with implementation

5 of the terms of all laws applicable to flood hazard
6 mitigation and the national flood insurance plan,
7 the assistance to appropriate agencies and local
8 governments of compliance and enforcement, the
9 provision of technical assistance to local govern-
10 ments, and the provision of information on flood
11 hazard mitigation and the national flood insurance
12 plan to agencies and the public.

APPENDIX C

Summary of Missouri Counties Participating in the National Flood Insurance Program

SUMMARY OF COUNTIES PARTICIPATING IN THE
NATIONAL FLOOD INSURANCE PROGRAM

| <u>County</u> | <u>Class</u> | <u># of Policies</u> | <u>Value (\$1,000)</u> | <u>Authority</u> | <u>P&Z</u> |
|----------------|--------------|----------------------|------------------------|------------------|----------------|
| Andrew | 3 | 9 | \$210 | 49.600 | Y |
| Atchison | 3 | 1 | 20 | (1) | N |
| Barton | 3 | 1 | 95 | 49.600 | N |
| Benton | 3 | 2 | 50 | (1) | N |
| Bollinger | 3 | 1 | 21 | (1) | N |
| Boone | 2 | 11 | 302 | 64.850 | Y |
| Buchanan | 2 | 71 | 2,146 | 64 | Y |
| Butler | 3 | 59 | 1,403 | 49.600 | N |
| Callaway | 2 | 8 | 291 | 49.600 | N |
| Cape Girardeau | 2 | 34 | 821 | 64.800 | Y |
| Carroll | 3 | 1 | 49 | 49.600 | Y |
| Carter | 3 | 2 | 65 | (1) | N |
| Cass | 2 | 36 | 2,301 | 49.600 | Y |
| Chariton | 3 | 0 | 0 | 49.600 | Y |
| Clark | 3 | 5 | 127 | 49.600 | N |
| Clay | 1 | 22 | 858 | 64.510 (2) | Y |
| Clinton | 3 | 1 | 20 | 64 | Y |
| Cole | 2 | 24 | 781 | 64 | Y |
| Cooper | 3 | 1 | 7 | 49.600 | N |
| Crawford | 3 | 5 | 155 | (1) | N |
| Dunklin | 3 | 26 | 881 | (1) | N |
| Franklin | 2 | 104 | 3,300 | 64.180 | Y |
| Gasconade | 3 | 27 | 485 | 49.600 | N |
| Greene | 1 | 26 | 1,746 | 64.211 | Y |
| Grundy | 3 | 0 | 0 | 49.600 | N |
| Holt | 3 | 19 | 356 | 49.600 | N |
| Howard | 3 | 4 | 113 | 49.600 | Y |
| Jackson | 1 | 16 | 516 | Charter | Y |
| Jasper | 2 | 0 | 0 | 49.600 | N |
| Jefferson | 1 | 485 | 17,426 | 49.600 | Y |
| Lafayette | 2 | 3 | 59 | 64.510 | Y |
| Lewis | 3 | 1 | 15 | (1) | N |
| Lincoln | 3 | 311 | 8,804 | 49.600 | Y |
| Livingston | 3 | 2 | 29 | (1) | Y |
| Maries | 3 | 19 | 393 | (1) | Y |
| Marion | 3 | 118 | 5,772 | 64 | Y |
| Mississippi | 3 | 106 | 2,933 | (1) | N |
| Moniteau | 3 | 2 | 186 | (1) | N |
| Montgomery | 3 | 27 | 526 | 49.600 | N |
| New Madrid | 3 | 32 | 748 | 49.600 | Y |
| Osage | 3 | 24 | 499 | 49.600 | N |
| Pemiscot | 3 | 45 | 1,374 | 64 | Y |
| Perry | 3 | 28 | 346 | 49.600 | N |
| Phelps | 3 | 38 | 1,636 | 49.600 | N |
| Pike | 3 | 28 | 858 | 49.600 | N |
| Platte | 2 | 117 | 4,102 | 64.510 | Y |
| Pulaski | 3 | 13 | 403 | 49.600 | Y |
| Ralls | 3 | 4 | 163 | (1) | Y |
| Ray | 3 | 14 | 387 | 64.800 | Y |
| Ripley | 3 | 13 | 300 | 49.600 | N |

SUMMARY OF COUNTIES PARTICIPATING IN THE
NATIONAL FLOOD INSURANCE PROGRAM

| <u>County</u> | <u>Class</u> | <u># of Policies</u> | <u>Value (\$1,000)</u> | <u>Authority</u> | <u>P&Z</u> |
|---------------|--------------|----------------------|------------------------|------------------|----------------|
| St. Charles | 1 | 1,509 | 58,657 | 64.510 (2) | Y |
| Ste Genevieve | 3 | 11 | 195 | 49.600 | Y |
| St. Francois | 2 | 8 | 497 | 49.600 | N |
| St. Louis | 1 | 1,045 | 73,562 | Charter | Y |
| Saline | 2 | 4 | 95 | 49.600 | N |
| Scott | 3 | 94 | 3,766 | (1) | Y |
| Stoddard | 3 | 30 | 873 | 49.600 | N |
| Vernon | 3 | 10 | 163 | 49.600 | N |
| Warren | 3 | 20 | 700 | 49.600 | Y |
| Wayne | 3 | 6 | 182 | 49.600 | N |

Notes:

(1) County implementing ordinances do not indicate a citation of statutory authority.

(2) Clay County and St. Charles County are presently first class noncharter counties. The enabling statute for a first class noncharter county authorizes full regulation of agricultural lands. However, the Clay County and St. Charles County ordinances were based upon the second class county statute which does not allow for total regulation.

APPENDIX D

**Map of Missouri Indicating National Flood
Insurance Participation**

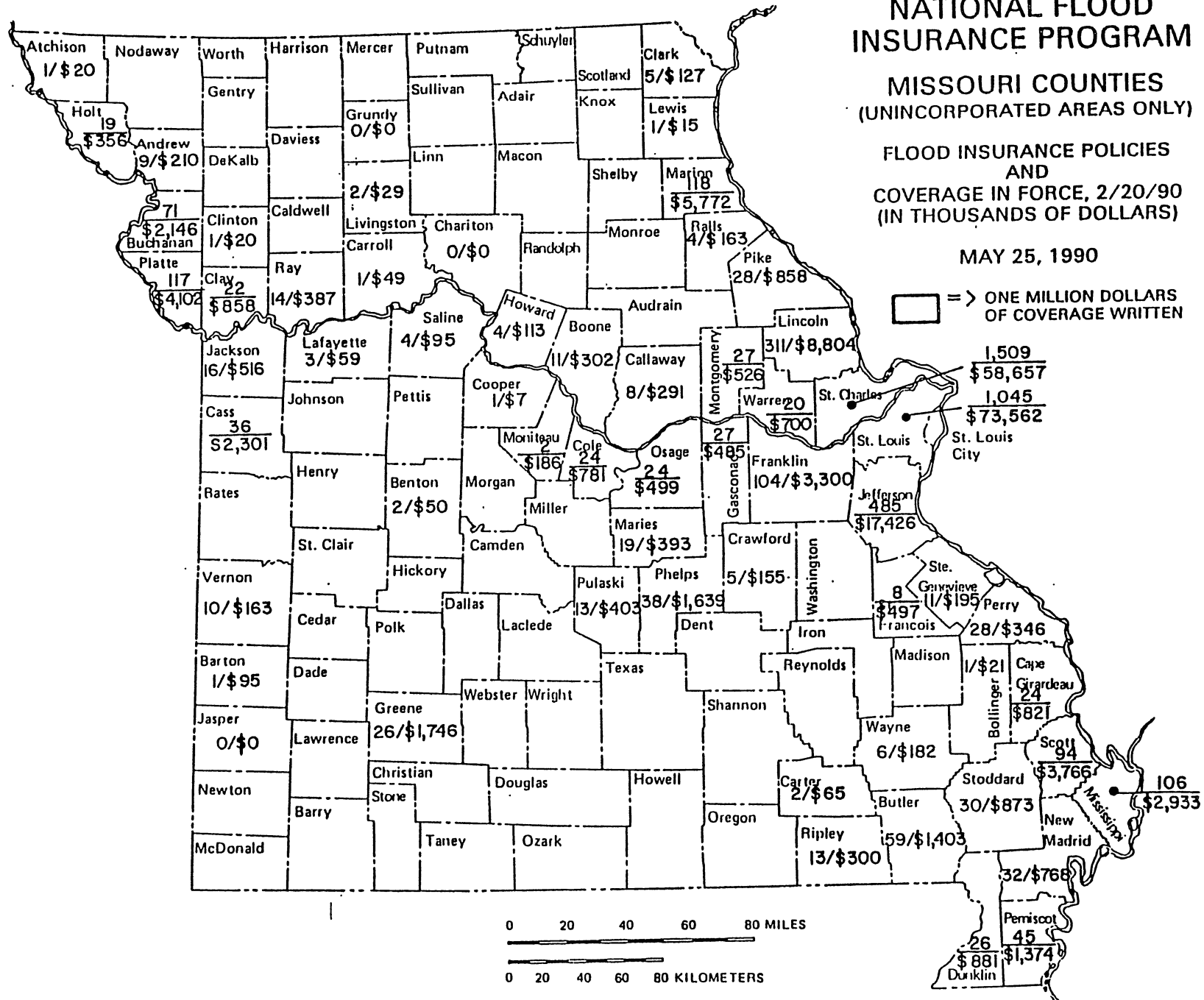
NATIONAL FLOOD INSURANCE PROGRAM

MISSOURI COUNTIES (UNINCORPORATED AREAS ONLY)

FLOOD INSURANCE POLICIES
AND
COVERAGE IN FORCE, 2/20/90
(IN THOUSANDS OF DOLLARS)

MAY 25, 1990

☐ => ONE MILLION DOLLARS
OF COVERAGE WRITTEN



APPENDIX E

Written Testimony by the Department of Natural Resources

Testimony for Senate - House Interim Committees
Flood Hazard Insurance
Jefferson City, MO
July 16, 1990

Until the Missouri Supreme Court decision in 1989 concerning St. Charles County, Missouri v. Dardenne Realty Company, et. al., flood hazard insurance in most Missouri counties was available to those living or doing business in flood hazard areas. In that case the trial court and the Court of Appeals determined that levees are considered as farm structures, but the Supreme Court did not address that issue. The Supreme Court held that because of the agricultural exemption in Chapter 64, counties cannot regulate agricultural lands. The Federal Emergency Management Agency (FEMA) then informed the State of Missouri that they believed the state did not have the authority to regulate the building or major modifications in flood hazard areas. This would make some 60 counties in Missouri ineligible for flood insurance once their present coverage expired.

FEMA representatives had made verbal statements that the agency would not renew flood hazard insurance unless Missouri statutes were modified in light of the Missouri Supreme Court decision. However, no official notification was received until February 6, 1990. In a letter addressed to Governor John Ashcroft, Mr. Frank H. Thomas, Assistant Administrator, Office of Loss Reduction, Federal Emergency Management Agency, Washington, D.C., stated that 60 counties in Missouri did not have adequate enabling authority to enforce their local floodplain management regulations.

The Department of Natural Resources, Flood Hazard Mitigation Unit in the Water Resources Program, Division of Geology and Land Survey, carries out the necessary work to assure that counties and other local government entities are eligible for flood insurance coverage. This includes community assistance visits, inspection of construction or major local ordinances to assure the ordinances are acceptable to FEMA, training workshops, assistance after a flood event, and other general support help.

The Department of Natural Resources assisted Representative Norwood Creason in the development of the proposed act, HB 1706, in order to meet the standards FEMA indicated were necessary to allow most Missouri counties to be eligible for flood hazard insurance. Initially, the Department took no position for or against HB 1706, rather presented it to the General Assembly to consider the merits of the matter. Department personnel in the Water Resources Program at times feel as if the flood insurance program has had little legislative support or interest. Thus, the Department did not want to appear as a biased representative in hearing testimony.

After it became apparent that HB 1706 had serious opposition as well as lack of interest, the Department Director, G. Tracy Mehan, III, stated in his Letter of May 7, 1990 to Representative Norwood Creason, that the Department, while still in disagreement with FEMA's position and unsuccessful in trying to get a change of position by FEMA on this issue, did support HB 1706. The Department agreed with Representative Creason's concern about the threat of insurance coverage loss and wanted to be sure that members of the General Assembly were aware of the position taken by FEMA.

The Department of Natural Resources recommends that the interim committee closely review the language of HB 1706 as introduced in the Second Session, 85th General Assembly. That language was found to be acceptable by FEMA. If HB 1706 had been enacted in law, flood hazard insurance eligibility would not be denied to Missouri counties. It is important to note that HB 1706 also addressed levee districts. FEMA at one time stated without the change as described in HB 1706, concerning levee districts, flood insurance eligibility also would be denied.

The Department also recommends that the interim committee closely review the opinion letter no. 136-90 as prepared by Attorney General William L. Webster. This letter of July 2, 1990 was sent to Mr. G. Tracy Mehan, III, in response to the request for an attorney general's opinion concerning the enforcement of floodplain regulations. The interpretation of the Attorney General basically is that the present statutory language in Section 49.600 is adequate to assume compliance with FEMA regulations, but not in most provisions of Chapter 64.

APPENDIX F

Attorney General's Opinion NO. 136-90



ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

July 2, 1990

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

OPINION LETTER NO. 136-90

G. Tracy Mehan, III
Director
Missouri Department of Natural Resources
P. O. Box 176
Jefferson City, Missouri 65102

Dear Director Mehan:

This opinion letter is in response to your question asking:

Is there any way that Missouri counties can enforce floodplain management regulations (that meet the minimum requirements of the National Flood Insurance Program regulations at 44 CFR §§ 60.3, 60.4 and/or 60.5) on lands used or to be used for agricultural purposes in light of the decision in St. Charles County, Missouri v. Dardenne Realty Company, et al., 771 S.W.2d 828 (Mo. banc 1989)?

The resolution of this issue requires an examination of state and federal law and implementing regulations pertaining to the National Flood Insurance Program ("NFIP").

The NFIP, 42 U.S.C. § 4001 et seq., was created by the National Flood Insurance Act of 1968, which was enacted as Title XIII of the Housing and Urban Development Act of 1968, P.L. 90-448. The purpose of the NFIP is to provide previously unavailable flood insurance protection to property owners in flood-prone areas. Mudslide protection was added by the Housing and Urban Development Act of 1969, P.L. 91-152, and flood-related erosion protection was added by the Flood Disaster Protection Act of 1973, P.L. 93-234.

One purpose of The Flood Disaster Protection Act of 1973, supra, was to

G. Tracy Mehan, III, Director

require States or local communities, as a condition of future Federal financial assistance, to participate in the flood insurance program and to adopt adequate flood plain ordinances with effective enforcement provisions consistent with Federal standards to reduce or avoid future flood losses. . . . 42 U.S.C. § 4002(b)(3).

To qualify for the sale of federally-subsidized flood insurance, a community must adopt and submit to the Federal Emergency Management Agency ("FEMA"), as part of its application, flood plain management regulations satisfying at a minimum the criteria set forth at 44 CFR Part 60 which are designed to reduce or avoid future flood, mudslide, or flood-related erosion damages. See, 44 CFR § 59.2(b). Such regulations must be legally enforceable, applied uniformly throughout the community to all privately and publicly owned land within flood-prone, mudslide and flood-related erosion areas, and the community must provide that the regulations take precedence over any less restrictive conflicting local laws, ordinances or codes. See, 44 CFR § 60.1(b). Minimum requirements for adequate flood plain management regulations are set forth at 44 CFR § 60.3 for flood-prone areas, at 44 CFR § 60.4 for mudslide areas, and at 44 CFR § 60.5 for flood-related erosion areas.

The minimum requirements for a community's flood plain management regulations increase as the amount of technical information supplied by FEMA to the community increases. For example, in a flood-prone area where FEMA has not defined a special flood hazard area, has not provided water surface elevation data, and has not provided sufficient information to identify the floodway, the community, at a minimum, shall: require permits for all proposed construction or development; review proposed development to ensure that all requisite permits have been obtained; review all permit applications, subdivision proposals, and other proposed development to determine whether proposed building sites will be reasonable safe from flooding; and require water supply and sanitary sewer systems be designed to minimize infiltration from flood waters. 44 CFR § 60.3(a).

However, in a flood-prone area, if FEMA has designated special flood hazard areas, but has not produced water elevation data nor identified a floodway, the community, at a minimum, shall: meet the requirements set forth in 44 CFR § 60.3(a); require permits for all proposed construction and other development within the designated special flood hazard areas; require subdivision proposals and other proposed development

G. Tracy Mehan, III, Director

provide base flood elevation data; review all reasonably available base flood elevation data; obtain the elevation in relation to mean sea level of the lowest floor of most all structures; obtain to what height buildings have been floodproofed; notify the state of any changes in watercourses; assure that the flood carrying capacity within any altered watercourse is maintained; and require manufactured homes be installed such as to minimize flood damage. 44 CFR § 60.3(b).

In Missouri, the authority of counties to prescribe flood plain management regulations exists in two statutory sources. Chapter 64, RSMo (1986) generally provides for county planning and zoning, and §§ 49.600 to 49.615, RSMo (1986) specifically address the NFIP.

Concerning first class charter counties, § 64.090.1, RSMo (1986) provides, in part,

For the purpose of promoting health, safety, morals, comfort or the general welfare of the unincorporated portion of counties, . . . the county commission . . . is hereby empowered to restrict, by order, in the unincorporated portions of the county, the height, number of stories and size of buildings, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence or other purposes, including areas for agriculture, forestry and recreation.

Concerning first class noncharter counties, § 64.255.1, RSMo (1986), provides, in part,

For the purpose of promoting health, safety, morals, comfort or the general welfare of the unincorporated portion of counties, . . . the county commission in all counties of the first class not having a charter form of government and not operating a planning and zoning program under the provisions of sections 64.800 to 64.905, is hereby empowered to regulate and restrict, by order, in the unincorporated portions of the county, the height, number of stories, and size of buildings, the

G. Tracy Mehan, III, Director

percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence, parks or other purposes, including areas for agriculture, forestry and recreation.

Concerning second and third class counties, § 64.620, RSMo (1986) provides, in part,

For the purpose of promoting health, safety, morals, comfort or the general welfare of the unincorporated portion of counties of the second or third class . . . the county commission . . . shall have power after approval by vote of the people . . . to regulate and restrict, by order of record, in said unincorporated portions of the county, the height, number of stories, and size of buildings, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence or other purposes, including areas for agriculture, forestry and recreation. . .

Concerning fourth class counties, § 64.850, RSMo (1986) provides, in part,

For the purpose of promoting health, safety, morals, comfort or the general welfare of the unincorporated portion of counties of the . . . fourth class . . . , the county commission . . . may, after approval by vote of the people as provided in section 64.845, regulate and restrict, by order of record, in the unincorporated portions of the county, the height, number of stories, and size of buildings, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and other land for trade, industry, residence or other purposes.

G. Tracy Mehan, III, Director

With respect to land used for agricultural purposes, several statutory provisions, so-called "agricultural exemptions," contained in chapter 64, affect lands used for agricultural purposes with regard to first class charter, second, third and fourth class counties. There is no agricultural exemption affecting land used for agricultural purposes in a first class noncharter county.

Regarding first class charter counties, § 64.090.2, RSMo (1986) provides:

The provisions of §§ 64.010 to 64.160 shall not be exercised or regulations imposed relating to the raising of crops on land used or to be used for agricultural purposes, orchards or forestry, or to require permits with respect to the erection, maintenance, repair, alteration or extension of farm buildings or farm structures to be used as such.

Regarding second and third class counties, § 64.620, RSMo (1986) provides, in part,

. . . The provisions of §§ 64.510 to 64.690 shall not be exercised so as to impose regulations or to require permits with respect to land, used or to be used for the raising of crops, orchards or forestry or with respect to the erection, maintenance, repair, alteration or extension of farm buildings or farm structures. . . .

Regarding fourth class counties, § 64.890.2, RSMo (1986) provides, in part,

The provisions of §§ 64.800 to 64.905 shall not be exercised so as to impose regulations or to require permits with respect to land used or to be used for the raising of crops, pasture, orchards or forestry or with respect to the erection, maintenance, repair, alteration or extension of farm buildings or farm structures. . . .

The Missouri Supreme Court addressed the agricultural exemption in § 64.620 in St. Charles County, Missouri v. Dardenne Realty Co. et al., supra. In that case, a second

G. Tracy Mehan, III, Director

class county enacted a flood plain order pursuant to chapter 64, which provided that no person, firm or corporation may initiate any development or substantial improvement without first obtaining a permit from the county. Four landowners challenged the county's attempt to require permits for their levee construction. The landowners asserted that the agricultural exemption in § 64.620 served to exempt their agricultural land from regulation under chapter 64. The Missouri Supreme Court, in affirming the trial court's entry of summary judgment, held that § 64.620 exempted from the permit requirement land used for the raising of crops.

As a result of the foregoing statutory agricultural exemptions, counties enacting flood plain ordinances under the provisions in chapter 64 may not be able to fully regulate flood plain development in accordance with the FEMA requirements set out in 44 CFR Part 60. With regard to first class charter counties, § 64.090.2 precludes a county from imposing regulations that require the obtaining a permit prior to the erection, maintenance, repair or alteration of farm buildings or farm structures. However, such a county is able to regulate, for flood plain management purposes, other activities on agricultural lands since the exemption only applies with respect to "regulations imposed relating to the raising of crops on land used or to be used for agricultural purposes (emphasis added)." In contrast, §§ 64.620 and 64.890.2, affecting second, third and fourth class counties, preclude the imposition of regulations or permit requirements with respect to land used for agricultural purposes or with regard to farm buildings and farm structures.

Concerning the implementation of the NFIP, § 49.600.1, RSMo (1986) states:

The county commission, in all counties which border the Mississippi River or the Missouri River and which have not adopted county planning and zoning, may, as provided by law, adopt or rescind by order or ordinance regulations to require compliance with Federal Emergency Management Agency standards, necessary to comply with the national flood insurance program, in any flood hazard area designated by the Federal Emergency Management Agency, and the county commission in any other county which has not adopted county planning and zoning, may, as provided by law, adopt or rescind

G. Tracy Mehan, III, Director

by order or ordinance regulations to require compliance with Federal Emergency Management Agency standards necessary to comply with the national flood insurance program, in any flood hazard area designated by the Federal Emergency Management Agency; provided, however, that no ordinance or order enacted pursuant to this section in any county other than those counties which border the Mississippi River or the Missouri River shall be effective unless the governing body of the county submits to the voters of a county, at a county or state general, primary or special election, a proposal to authorize the governing body of the county to adopt such an order or ordinance.

There is an exemption found in § 49.600.3, RSMo (1986) which states:

The provisions of this section shall not apply to the incorporated portions of the counties, or to land used or to be used for the raising of livestock, crops, orchards or forestry, nor shall this section apply to the erection, maintenance, repair, alteration or extension of farm buildings or farm structures used for such purposes on these lands and shall not apply to underground mining where entrance is through an existing shaft or shafts or through a shaft or shafts not within the area shown on the flood hazard map, which will not increase flood heights.

The issue to be resolved concerns whether the exemption in § 49.600.3 relating to agricultural lands, farm buildings and farm structures, and underground mining shafts serves to preclude a county's authority to regulate such uses for flood plain management purposes.

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in their plain and ordinary meaning. Wolff Shoe Co. v. Director of Revenue, 762 S.W.2d 29 (Mo. banc 1988). The title of a legislative act may be given weight in ascertaining legislative intent and true scope of statute. Atwell v. Jack Henry and

G. Tracy Mehan, III, Director

Associates, Inc., 748 S.W.2d 929 (Mo. App. 1988). In construing a statute to determine legislative intent, it is presumed that the legislature was aware of the state of law at the time of its enactment. Nicolai v. City of St. Louis, 762 S.W.2d 423 (Mo. banc 1988). The General Assembly is presumed to be aware of existing declarations of law and construction of statutes when it enacts a law on the same subject. State v. Coor, 740 S.W.2d 350 (Mo. App. 1987). A statute is to be given a reasonable interpretation in light of the legislative objective, and the true intention of the framers must be followed; where necessary the strict letter of the act must yield to the manifest intent of the legislature. BCI Corp. v. Charlebois Construction Co., 673 S.W.2d 774 (Mo. 1984). The true intention of the legislature must be followed, and, if necessary, the strict letter of the act must yield to its obvious intent. State ex rel. Hickman v. City of Kirksville, 690 S.W.2d 799 (Mo. App. 1985).

Sections 49.600-.615 were enacted as Senate Bill 746 during the Second Regular Session of the Eightieth General Assembly in 1980. The preamble to Senate Bill 746 stated:

AN ACT to allow county courts in second, third, and fourth class counties to participate in the national flood insurance program, with an emergency clause.

While subsequent amendments changed the reference in § 49.600.1 from "county court" to "county commission" and deleted the references to second, third and fourth class counties [see, House Bill 34, First Regular Session, 82nd General Assembly (1983) and Senate Bill 219, First Regular Session, 82nd General Assembly (1983)], the purpose was unchanged. Accordingly, the specific purpose underlying the enactment of §§ 49.600-.615 was to enable counties to participate in the NFIP.

In enacting legislation authorizing counties to participate in the NFIP, the presumption exists that the General Assembly was aware of the federal laws and regulations implementing the NFIP. Nicolai v. City of St. Louis, *supra*. This presumption is supported by the General Assembly's inclusion of several of the FEMA standards concerning base flood elevation information, adequate installation requirements, and a reference to the one hundred year flood event in § 49.605, RSMo (1986), which states:

No permit required by the provisions of order or ordinance regulations adopted pursuant to the provisions of §§ 49.600 to 49.615 shall be denied an applicant if the

G. Tracy Mehan, III, Director

proposed construction, use or other development will not raise the flood elevation of the one hundred year flood level more than one foot; provided, however, that any permit may require that the lowest floor of an insurable structure shall be above the one hundred year flood level and that all structures shall be adequately anchored to prevent flotation, collapse or lateral movement of the structure.

In construing § 49.600.3, it is necessary to give effect to the language, "which will not increase flood heights." Although doing so involves an ungrammatical sentence structure, the only means to give any operative effect to this language is to interpret the phrase as modifying the statutory exemptions, agricultural lands, farm buildings and structures, and underground mining shafts, present in the statute. Where several words are followed by a clause as much applicable to the first and other words as to the last, the clause should be read as applicable to all. Norberg v. Montgomery, 173 S.W.2d 837 (Mo. 1943). The meaning of a statute may be plain although it contains mistakes in writing, grammar, spelling, punctuation, misnomers, misdescriptions, surplusage or omits words. State ex rel. Klein v. Hughes, 173 S.W.2d 877 (Mo. 1943).

Moreover, the phrase, "which will not increase flood heights," must be afforded its plain and ordinary meaning, but, at the same time, the legislative intent in enacting §§ 49.600-.615 must be followed. The plain and ordinary meaning of the term, "flood," is, "a rising and overflowing of a body of water, especially onto normally dry land." Webster's Ninth New Collegiate Dictionary (1985). With regard to the exemptions, such phrase can only be interpreted to mean that the exemptions exist for agricultural land, farm buildings and structures, and underground mining shafts in areas not impacted by flood heights, i.e. in areas not normally susceptible to flooding. Any contrary interpretation would preclude a county from regulating such uses for purposes of compliance with the NFIP requirements, thereby defeating the expressed legislative intent.

Accordingly, under the authority of § 49.600.1, counties may enact regulations in order to comply with FEMA standards in implementing the NFIP. In addition, such regulations may concern land used for agricultural purposes, farm buildings and structures, and underground mining shafts when such are located within an area susceptible to flooding. Areas susceptible to

G. Tracy Mehan, III, Director

flooding are identified in the applicable FEMA regulations in 44 CFR Parts 59 and 60.

In summary, the authority of counties to adopt ordinances implementing the NFIP requirements arises from two statutory sources. Under the provisions of chapter 64, and as a result of the aforementioned agricultural exemptions, second, third and fourth class counties may not regulate, for NFIP purposes, agricultural lands or farm buildings and structures used for agricultural purposes. In this regard, St. Charles County, Missouri v. Dardenne Realty Co., supra, addressed the authority of a second class county to regulate such uses and upheld the exemption. However, by operation of the agricultural exemption, first class charter counties may regulate, for NFIP purposes, agricultural lands but may not require permits for farm buildings and structures. First class noncharter counties may fully regulate agricultural lands, farm buildings and farm structures. Under the provisions in §§ 49.600-.615, which were enacted by the General Assembly for the express purpose of allowing participation in the National Flood Insurance Program, all counties bordering the Mississippi River and the Missouri River that have not enacted county planning and zoning and any other county that has not enacted county planning and zoning may, upon approval of the voters, enact ordinances to meet FEMA standards in order to participate in the NFIP. Such counties may regulate agricultural lands, farm buildings and structures, and underground mining shafts in areas subject to flooding, but, as a result of the operation of the exemption in § 49.600.3, counties may not regulate such uses outside of areas subject to flooding. Such areas susceptible to flooding are described by FEMA in its regulations in 44 CFR Parts 59 and 60.

In conclusion, counties deriving their regulatory authority from §§ 49.600-.615, RSMo (1986), first class noncharter counties, and, in certain circumstances, first class charter counties, all have authority to enforce the requirements of the National Flood Insurance Program contained in 44 CFR Part 60 on lands used or to be used for agricultural purposes.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

APPENDIX G
Notification of Suspension From FEMA



Federal Emergency Management Agency

Washington, D.C. 20472

AUG 20 1990

RECEIVED

AUG 22 1990

GOVERNOR'S OFFICE

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Honorable John Ashcroft
Governor of Missouri
State Capitol Building
Jefferson City, Missouri 65101

Dear Governor Ashcroft:

This letter is to inform you that the Federal Emergency Management Agency (FEMA) has reviewed the State of Missouri Attorney General's Opinion Number 136-90 forwarded in response to our June 1, 1990 letter. Based on the review by FEMA's Office of General Counsel, FEMA has concluded that the Attorney General's Opinion confirms that the affected Missouri counties do not have adequate enabling authority to regulate development in special flood hazard areas on land used for agricultural purposes. Therefore, FEMA will initiate suspension of the 60 Missouri counties under 44 C.F.R. Section 59.24(a) of the National Flood Insurance Program (NFIP) regulations.

Under this Section, the counties will be subject to suspension from the NFIP six months from the date the Administrator of the Federal Insurance Administration provides notification to them of the need to submit adequate floodplain management regulations meeting requirements of the appropriate paragraphs of Section 60.3. You were previously notified that FEMA would proceed with suspension under Section 59.24(d) of the controlling regulations. However, FEMA also has authority to suspend under Section 59.24(a), and will use it in an effort to accommodate your stated requests for additional time to enact the necessary legislation to correct this problem.

The Attorney General's Opinion offered additional information regarding the class distinctions between the Missouri counties and their ability to enforce their floodplain management regulations for development occurring in the 100-year floodplain on land used for agricultural purposes. It is our understanding that it is the Attorney General's interpretation that only the first class non-charter counties, and, in certain circumstances, first class charter counties, have the authority to enforce the NFIP requirements on lands used for agricultural purposes.

Moreover, Missouri Attorney General's Opinion Number 117-89 states that levees controlled by levee districts are not subject to regulation by community floodplain management ordinances. Thus, any community in the State of Missouri which contains a levee district is non-compliant with minimum NFIP requirements and the community is ineligible for further participation in the NFIP.

Based on these Opinions, FEMA concludes that 60 counties in Missouri lack the required enabling authority to regulate all development in the 100-year floodplain on land used for agricultural purposes and/or actions by levee and drainage districts. Therefore, FEMA will notify all 60 counties of their impending suspension. In effect, this provides the State of Missouri with a six-month period to take the required legislative action to resolve this enforcement problem.

The six-month period will start on September 1, 1990. A letter will be sent to each of the affected counties prior to this date, informing them of their impending suspension and of FEMA's requirements for resolving the problem. During the six-month period, FEMA will remind the affected counties by letter when 90-days of eligibility remain. A formal 30-day notice of the suspension will be mailed to the counties on or about February 1, 1991, with a suspension effective date of March 4, 1991. If FEMA receives documentation that the State has passed and the Governor has signed adequate remedial legislation, FEMA will terminate the suspension process.

The basic elements that must be included in the revision of the legislation are: 1) floodplain management regulations adopted by Missouri counties must be made applicable to all development in the communities throughout designated special flood hazard areas; 2) these authorities must be applied to all classes of counties; and 3) the legislation must allow Missouri communities to regulate levees or other floodplain developments controlled by levee districts and drainage districts.

As you may recall, a trial court in St. Charles County, Missouri, vs. Dardenne Realty Company et al. found that levees are considered to be farm structures, and that no permits are required for constructing them. In addition, the Missouri Supreme Court at 771 S.W. 2d 828 (Mo. banc 1989) upheld the statute's exemption from floodplain management restrictions of any land used for the raising of crops. Exemption of any land within a special flood hazard area from the minimum NFIP requirements is not in compliance with the legislation establishing the NFIP (Sections 1315 and 1305(c) of the National Flood Insurance Act of 1968). These sections prohibit FEMA from making insurance available in a community unless that community

adopts floodplain management measures with effective enforcement provisions that meet minimum NFIP standards. (See also 44 C.F.R. Section 60.2 of FEMA's regulations controlling the NFIP).

For this reason, the residents of 60 counties could lose their eligibility for flood insurance under the NFIP and eligibility for certain Federal disaster assistance, unless legislative action is taken prior to the effective date of suspension from the NFIP.

The consequences of suspension from the NFIP for the 60 counties would be twofold. First, there are nearly 5,000 existing flood insurance policies with \$200 million in coverage within the unincorporated areas of the 60 counties. These policies would expire at the end of their terms and could not be renewed and no new policies could be purchased. Second, suspended communities are also subject to the provision of Section 202 of Public Law 93-234, the Flood Disaster Protection Act of 1973, as amended. This Section prohibits Federal agencies and officers from approving any form of loan, grant, guaranty, insurance payment, rebate, subsidy, disaster assistance loan or grant (in connection with a flood), or any other form of direct Federal assistance for acquisition or construction purposes within special flood hazard areas of suspended communities. Included in this prohibition, for example, is the making of mortgage loans guaranteed by the Department of Veterans Affairs or insured by the Federal Housing Administration. Approval of mortgage loans, secured by homes or farm buildings, by the Farmers Home Administration, Department of Agriculture, is similarly prohibited. Conventional loans from Federally insured or regulated lending institutions would be available at the discretion of the lenders.

It is our expectation that the State of Missouri will take the necessary action prior to the March 4, 1991 suspension date, to provide counties with the enabling authorities necessary to continue their participation in the NFIP. I would sincerely regret having to suspend the availability of flood insurance to Missourians. I am prepared to forestall suspension, or if suspension occurs, to reinstate insurance availability as soon as the counties are given the necessary authority to carry out their floodplain management responsibilities. As always, FEMA staff stand ready to provide technical assistance in resolving the agricultural exemption issue.

If you should have any questions, contact S. R. Mellinger,
Regional Director of the Region VII Office at (816) 283-7060
or call me at (202) 646-2781.

Sincerely,

A handwritten signature in dark ink, appearing to read "C. M. Schauerte", with a long horizontal flourish extending to the right.

C. M. "Bud" Schauerte
Administrator
Federal Insurance Administration

